TOH SHU HUA & ORS v. WAWASAN RAJAWALI SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AKHTAR TAHIR J
[CIVIL SUIT NO: WA-22NCVC-296-05-2019]
6 JANUARY 2023

Abstract – *A sale and purchase agreement regarding the purchases of apartments in a project must comply with the statute and must be read within the ambit of the statute where it is stated that the period of completion of a residential property is 36 months. A letter of extension of completion given by the Controller of Housing, who has no authority to give such extension, has no legal effect; (ii) The developers are found to have perpetuated misrepresentation on the purchases of the apartments in the project where there is positive assertions in a manner not warranted and a breach of duty with intent to give advantage thereby inducing a party to the agreement to make a mistake as to the substance of the agreement; and (iii) When there is evidence of lack of proper workmanship and material, the defects ought to be rectified by the developers.*

CONTRACT: *Housing development – Sale and purchase agreement – Late delivery of vacant possession of apartments purchased – Whether period of completion of residential property 36 months – Whether Controller of Housing has authority to give extensions – Whether letter of extension of completion had legal effect – Whether claim for late delivery for vacant possession allowed*

CONTRACT: *Misrepresentation – Agreement – Sale and purchase agreement – Whether there was positive assertion in manner not warranted – Whether there was breach of duty with intent to induce party to agreement – Whether purchasers influenced to buy apartments from the way project was marketed by developers – Whether there was loss for purchasers – Whether monetary compensation reasonable*

HOUSING DEVELOPERS: *Housing development – Defects – Rectification of defects – Lack of proper workmanship and material – Whether claim for defects to be rectified by developers*

TORT: *Liability – Vicarious liability – Housing development – Whether parent company involved in development project – Whether fit and proper case to lift veil of corporation – Whether separate entities – Whether purchasers had cause of action against parent company*

DAMAGES: *Aggravated damages – Claim for – Housing development – Developers showed defiant and combative attitude – Whether there was evidence from developers showing they would carry out all promises – Whether purchasers entitled to aggravated damages*

This was a claim brought by 122 plaintiffs as a representative action against the defendants for purchases of apartments in a project ('project') which was developed by the first defendant with the second defendant being the parent company of the first defendant. The grievances of the plaintiffs, the purchasers of the project, against the defendants were: (i) late delivery of vacant possession of the apartments purchased; (ii) loss suffered as a result of misrepresentation by the defendants as to the nature of the project; and (iii) damages suffered as a result of prevalent defects both in the apartments purchased as well as common areas. The plaintiff further claimed that the second defendant was vicariously liable for the breach of contract of the first defendant. The plaintiffs also claimed, as the damages were ongoing and no steps had been taken by the defendants to rectify all the wrongdoings nor had the defendant showed any remorse, they were entitled to aggravated damages.

Held (allowing plaintiffs' claim against first defendant; dismissing plaintiffs' claim against second defendant):

(1) The sale and purchase agreement must comply with the statute and must be read within the ambit of the statute where it is stated that the period of completion of a residential property is 36 months. In this case, the letter of extension of completion to a period of 48 months was given by a letter on behalf of the Controller of Housing. The Controller of Housing has no authority to give extensions and therefore the letter had no legal effect. The defendants' contention that the plaintiffs were aware of the extension was of no avail as what is unlawful remains unlawful, even if the parties acquiesce to it. The Contracts Act 1950 is clear where it is stated, for a valid contract to exist, neither the consideration nor the object can be unlawful. The period of delivery of vacant possession exceeded the 36 months allowed by the law and therefore the plaintiffs' claim for late delivery of vacant possession was allowed. (paras 8-11)

(2) For misrepresentation under the law to operate there must be *inter alia* a positive assertion in a manner not warranted, breach of duty with intent to give advantage thereby inducing a party to the agreement to make a mistake as to the substance of the agreement. The positive assertions were contained in the brochures published to market the sale of the apartment to which the public had access to, including to the plaintiffs. The positive assertions of the project were also made by the sales pitch of the sales person. It could be inferred that each of the plaintiff was induced to buy the property based on any of the sale methods employed by the defendant. What reverberated in the sale of the apartment was the promise of a complete township offered by the developer for the purchasers buying the apartment in the project. The project promised a person purchasing a property to enjoy work, play, recreate in one area. The brochures were not merely an invitation to treat but were worded in the form of promises. (paras 13-18)

(3) It was clear from the evidence adduced that this promise of 'your world in one place', a phrase used in the brochures, was not achieved and not likely to be achieved in the near future, the glaring omission being the shopping mall and other amenities and overall lack of vibrancy promised. What was pictured in the brochures was not even remotely visible at present. The project was not even a semblance of the lifestyle promised and pictured in the marketing of the project. It was a duty upon the defendant to give a near accurate description of the project which in this case they had failed to do so with the non-completion of many of the amenities promised. The defendants did perpetuate misrepresentation on the purchases of the apartment in this project which included the plaintiffs in this case. The plaintiffs were influenced to buy the apartments in this project by the way the project was marketed by the first defendant. (paras 18-22)

(4) The real loss for the plaintiffs was the enjoyment of the use of the apartments in a manner promised to them. The enjoyment of working, playing, recreating all in one place could not be enjoyed at the moment and even into the future. It was difficult to quantify this loss of enjoyment but the court was of the view that some monetary compensation should be awarded. This monetary compensation should be reasonable and should not burden the defendant, as in this case, the claimants were many. Therefore, this court determined that the plaintiffs were entitled to RM50,000 each for the loss of enjoyment on the promise of the first defendant. (paras 28-30)

(5) Both parties were directed to carry out a joint inspection of the project to determine the actual defects which existed and to prepare a concise report on the defects as well as identify the places the defects were found. This court ruled that not all defects need to be rectified by the defendants as some of the defects were minor and no benefit would be gained in rectifying the defects. However, amongst the defects allowed found in the apartments were for, *inter alia*, the defendants to provide a safety harness and a platform for air condition maintenance services. There were also a number of apartments which had tiles both on the floor and the wall which were hollows for lack of proper workmanship, and the common area had wide cracks which could have only been caused by poor workmanship and material, which was the responsibility of the defendants to rectify. The court allowed the plaintiffs' claim for the defects to be rectified by the defendants. (paras 31-38)

(6) The defendants had taken a defiant and combative attitude in matters that could have been resolved much earlier and with the consultation of the residents. There was also no indication or evidence from the defendant showing that they would carry out all the promises as stated

in the brochure especially the 'world in one place.' The plaintiffs were therefore entitled to aggravated damages to the amount of RM2 million to be shared amongst the plaintiffs. (paras 39-40)

(7) On the issue of vicarious liability, apart from evidence that the second defendant was the parent company of the first defendant company, there was no evidence of the second defendant's involvement of the project which was fully carried out by the first defendant. The court could not detect any evidence proving that the second defendant was the controlling mind of the first defendant and therefore this was not a proper case to lift the veil of corporation. As both the defendants were separate entities, there was no cause of action by the plaintiffs against the second defendant. (paras 41 & 42)

Case(s) referred to:
Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 18, 19

For the plaintiffs - M/s Rajadeevan & Assocs
For the defendants - M/s Lee Hishamuddin Allen & Gledhill
M/s Chooi & Co + Cheang & Ariff

Reported by Suhainah Wahiduddin

JUDGMENT

Akhtar Tahir J:

Introduction

[1] This is a claim brought by 122 plaintiffs as a representative action against the defendants for purchases of apartment in a project known as Eclipse Residence ("the project") which was developed by the first defendant with the second defendant being the parent company of the first defendant.

[2] This matter went for a full trial whereby both parties relied on oral testimony of witnesses, documentary evidence which were contained in the joint bundle of documents as well as a report prepared in pursuance of a site visit directed by the court.

A Summary Of The Evidence Adduced

[3] While there was no dispute that the plaintiffs were the purchasers of the project developed by the first defendant, there were a number of grievances by the plaintiffs against the defendants which can be summarised from the totality of the evidence adduced.

[4] The grievances of the plaintiffs against the defendants could be categorised as follows:

(i) late delivery of vacant possession of the apartments purchased;

(ii) loss suffered as a result of misrepresentation by the defendants as to the nature of the project;

(iii) damages suffered as a result of prevalent defects both in the apartments purchased as well as common areas.

[5] The plaintiff further claimed that the second defendant was vicariously liable for the breach of contract of the first defendant. Finally, the plaintiffs also claimed as the damages are ongoing and no steps have been taken by the defendants to rectify all the wrongdoings nor has the defendant showed any remorse, entitled them to aggravated damages.

The Issues

[6] The court viewed that the issues to be decided in this case to follow the determination of the grievances of the plaintiff as categorised above.

Damages For Late Delivery

[7] The court agrees with the submission of the plaintiff that this issue has been with finality decided by the Apex Court in the case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 where it was stated as follows:

> [38] In the case of *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [20081 4 CLJ 618: [2008] 4 MLJ 852, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal said:
>
> > The contract which has fallen for consideration in the present case is a special contract. It is prescribed and regulated by statute. While parties in normal cases of contract have freedom to make provisions between themselves, a housing developer does not enjoy such freedom. Hence parties to a contract in Form H cannot contract out of the scheduled form. Terms more onerous to a purchaser may not be imposed. So too, terms imposing additional obligations on the part of a purchaser may not be included in the statutory form of contract.
>
> [39] The Federal Court in *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232, reiterated the object of the Act by making the following observation:
>
> > Now, cl. 23 is part of a statute based contract. In this country, the relationship between a house-buyer and a licensed developer is governed by the Housing Developers legislation. Its object is to protect house buyers against developers. A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it.

A [40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the
B Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

[41] The legislative intent that the duties shall remain with the Minister, may be discerned from ss. 11 and 12 of the Act. Under s. 11, whilst the Controller is given the power to investigate on the reason why a licensed
C housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser, it is the Minister who is empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the Act. Likewise under s. 12 which provides
D for the powers of the Minister to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the Act. Such directions, which shall be given in writing, are binding on the developer.

[8] It is clear from the above case that the sale and purchase agreement
E must comply with the statute and must be read within the ambit of the statute where it is stated that the period of completion of a residential property is 36 months. In this case, the letter of extension of completion to a period of 48 months was given by a letter dated 16 December 2013 on behalf of the controller of housing. The controller of housing has no authority to give
F extension as decided by the case above and therefore the letter has no legal effect.

[9] The court also rules that the defendant's contention that the plaintiffs were aware of the extension is of no avail as what is unlawful remains unlawful, even if the parties acquiesce to it. The Contracts Act 1950 is clear
G where it is stated for a valid contract to exist, neither the consideration nor the object can be unlawful.

[10] The defendant's contention that the plaintiff's should challenge the extension given by the authorities by way of judicial review is without basis as the plaintiffs can choose to exercise their rights to challenge the agreement
H with the defendant by way of a civil suit instead of challenging the decision of the Minister which is void ab inito in the first place.

[11] In this case, the court is satisfied that the period of delivery of vacant possession exceeded the 36 months allowed by the law and therefore allowed the plaintiffs' claim for late delivery of vacant possession according to the
I amount claimed in the amended statement of claim in accordance with the late delivery for each plaintiff.

Misrepresentation

[12] Misrepresentation under contracts law is as stated in s. 18 of the Contracts Act 1950 which states as follows:

> "Misrepresentation" includes:
>
> (a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
>
> (b) any breach of duty which, without an intent to deceive, gives an advantage to the person committing it, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him; and
>
> (c) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

[13] For 'misrepresentation' under the law as stated above to operate there must be *inter alia* a positive assertion in a manner not warranted, breach of duty with intent to give advantage thereby inducing a party to the agreement to make a mistake as to the substance of the agreement.

[14] In this case the positive assertions were contained in the brochures published to market the sale of the apartment to which the public had access to, including to the plaintiffs. The positive assertion of the project were also made by the sales pitch of the sales person. The publication of the brochures for sale of apartment as well as the sales pitch of the sale executives and construction of sales galley are common features in the sale of properties in Malaysia which this court can take judicial notice of.

[15] In the light of this, it is unnecessary for each of the plaintiffs to testify in what manner they were individually convinced to purchase the apartments. Even without the oral testimony of each plaintiff, it can be inferred that each of the plaintiff was induced to buy the property based on any of the sale methods employed by the defendant.

[16] What reverberated in the sale of the apartment in this project is the promise of a complete township offered by the developer for the purchasers buying apartment in the project. In other words, the project promised a person purchasing a property to enjoy work, play, recreate in one area. Nowhere is this promise more clearly portrayed than the phrase used in the brochures which reads loud and clear "Your world in one place".

[17] Amongst this promise of the world in one place was "a rustle of leaves and wide wooden walkways along side modern glass and steel" and even more attractive is the residence is "Esclipse Residence at Pan'gaea is part of a self-sustained integrated development in the heart of Cyberjaya. A true urban gem, the freehold property offers semi-furnished service apartments

ranging from 458 to 990 sq ft, a diverse 'habitat' in which to work, play and thrive, your neighbours includes the Paragon's solo suites and boutique retail shops, sostice service apartments, the apatio, a lively street shopping quarter and the gallery Mall with over 300,000 sq ft of net lettable space. Make your home in one of Pangea's crown jewels and enjoy the pinnacle of urban living"

[18] The brochure was accompanied by other details including the size of the apartments, the overall impression of the entire project and many other features. The court rules that the brochures were not merely an invitation to treat as contended by the defendants but were worded in the form of promises.

[19] It is clear from the evidence adduced that this promises of "your world in one place" was not achieved and not likely to be achieved in the near future, the glaring omission being the shopping mall and other amenities and overall lack of vibrancy promised. It is clear that what was pictured in the brochures was not even remotely visible at present.

[20] The court cannot accept the arguments of the defendants that the brochure had an exclusion clause which safeguarded the defendant from any discrepancy in the description of the project. For one, the exclusion clause was in a fine minute wordings at the bottom of the page. Further in marketing the project, there must be a grain of truth in the promise made even if not fully accurate and even if there is an exclusion clause.

[21] In this case, the court noted that the project was not even a semblance of the lifestyle promised and pictured in the marketing of the project. It is a duty upon the defendant to give a near accurate description of the project which in this case they have failed to do so in this case with the non-completion of many of the amenities promised.

[22] The court therefore rules that the defendants did perpetuate misrepresentation on the purchases of the apartment in this project which includes the plaintiffs in this case. The court also rules that the plaintiffs were influenced to buy the apartments in this project, by the way the project was marketed by the first defendant.

[23] The effect of an agreement entered under misrepresentation is as stated under s. 19 of the Contracts Act 1950 which provides as follows:

> (1) When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.
>
> (2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

Exception – If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of s. 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation – A fraud or misrepresentation which did not cause the consent to a contract of the party on whom the fraud was practised, or to whom the misrepresentation was made, does not render a contract voidable.

ILLUSTRATIONS

(a) A, intending to deceive B, falsely represents that five hundred gantangs of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b) A, by a misrepresentation, leads B erroneously to believe that five hundred gantangs of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred gantangs of indigo have been made.

After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.

(d) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[24] From the above provision, it is clear that the party suffering the breach by way of misrepresentation may rescind the contract or insist the contract be performed and the plaintiffs be put in a position if what the representation made were true. This provision negates the defendants' contention that where misrepresentation is proved, the plaintiffs can only rescind the contract but cannot claim for damages.

[25] In this case, the plaintiffs are not seeking to rescind the contract but asking the contract to be performed and that they be put in a position to benefit if the representation were true. The plaintiffs in this claim seeks to be compensated for the loss of the value of the property which would have otherwise been valued in the event the representation were true.

[26] For this purpose, the plaintiffs had adduced the evidence of a valuer who has prepared a report of the value of the property in the event all the amenities were provided by the defendants as promised against the present value in its present state.

[27] In the court's view, this is not a proper remedy as this loss of value of the property will only be suffered if the plaintiffs had intention to sell their apartments which none of the plaintiffs have indicated in this case. In the converse the plaintiffs are asking for the defects to be rectified. This indicates that the plaintiffs are intending to stay at the apartments.

[28] The real loss for the plaintiffs is the loss of enjoyment of the use of the apartments in a manner promised to them. The enjoyment of working, playing recreating all in one place cannot be enjoyed at the moment and even into the future.

[29] It is difficult to quantify this loss of enjoyment but the court is of the view that some monetary compensation should be awarded. The court is also of the view that this monetary compensation should be reasonable and should not burden the defendant, as in this case the claimants are many.

[30] The court determined therefore the plaintiffs are entitled to RM50,000 each for the loss of enjoyment on the promise of the first defendant.

Rectification Of The Defects

[31] During the proceedings the court directed both the parties to carry out a joint inspection of the project to determine the actual defects which exists and to prepare a concise report on the defects as well as identify the places the defects are found.

[32] The report on the joint inspection detected defects both in the various apartments as well as in the common areas. The court ruled that not all defects need to be rectified by the defendants as some of the defects were minor and no benefit would be gained in rectifying the defects. The court also decided that the first defendant is responsible for rectifying the defects as the first defendant had been notified of the defects within the defects' liability period.

[33] Amongst the defects the court allowed found in the apartments and this includes all the apartments are for the defendants to provide a safety harness and a platform for air condition maintenance services. At the moment there was no safety ledge for a person doing the maintenance from outside the apartment.

[34] A number of apartments were also found to be leaking at certain areas and although the source of the leak could not be properly identified the court viewed it the responsibility of the defendants to identify the source and rectify it.

[35] There were also a number of apartments where the electrical plugs were at a place that could be hazardous due to presence of water outlets and therefore such electrical plus needed to be moved.

[36] The court was also satisfied that a number of apartments which had tiles both on the floor and the wall which were hollows for lack of proper workmanship. The defendants needed to rectify this.

[37] For the common area, the serious defects were wide cracks which could have only be caused by poor workmanship and material which is the responsibility of the defendants to rectify. There were also public areas in the common area which had the retaining walls lower than the authorised specification and this need to be rectified by the defendants.

[38] In short, for the defects the court allowed the plaintiffs' claim for the defects to be rectified by the defendants.

Aggravated Damages

[39] In this case, the court noted that the defendants had taken a defiant and combative attitude in matters that could have been resolved much earlier and with the consultation of the residents. There is also no indication or evidence from the defendant showing that they will carry out all the promises as stated in the brochure especially the 'world in one place'.

[40] The court therefore decided that the plaintiffs are entitled to aggravated damages to the amount of RM2 million to be shared amongst the plaintiffs.

Vicarious Liability

[41] On the issue of vicarious liability, the court decided that apart from evidence that the second defendant was the parent company of the first defendant company there is no evidence of the second defendant's involvement of the project which was fully carried out by the first defendant. The court could not detect any evidence proving that the second defendant was the controlling mind of the first defendant and therefore this was not a proper case to lift the veil of corporation.

[42] As both the defendants are separate entities, the court ruled that there was no cause of action by the plaintiffs against the second defendant.

Conclusion

[43] Based on the factors above, the court allowed the plaintiffs' claim against the first defendant with a cost of RM200,000 and dismissed the plaintiffs' claim against the second defendant with a cost of RM30,000.